Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

CANADIAN TELEPHONE EMPLOYEES' ASSOCIATION,

COMMUNICATIONS, ENERGY AND

PAPERWORKERS UNION OF CANADA,

FEMMES-ACTION

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

BELL CANADA

Respondent

MOTION TO STRIKE

Ruling No. 7

2002/06/10

PANEL: J. Grant Sinclair, Chair

Pierre Deschamps, Member

[1] The need for this ruling arises out of the Statement of Case filed by each party at the direction of the Tribunal. Each of the parties' Statement of Case sets out the material facts, the witnesses and the gist of their evidence and the remedies sought.

[2] One of the remedies asked for by the Commission and the Complainants, CTEA, CEP and Femmes-Action in their Statement of Case, was compensation from Bell Canada for those employees in female-dominated, occupational groups found to be receiving discriminatory wages during the *retroactive period* and who take up new employment involving the same or similar duties in circumstances where the new employer is directly or indirectly controlled or partially controlled by or related to Bell. The request for this remedy is found in paragraph 8(c) of the Commission' Statement; in paragraph 6 of CTEA's Statement; in paragraph 8(a) of CEP's Statement of Case and Femmes-Action adopted paragraph 8(c) of the Commission's Statement (all of which are referred to as the "8(c) Remedy").

[3] CTEA goes somewhat further in its request. It asks for compensation on the same basis except that it would apply to any *new* employer not just a new employer controlled by Bell. CTEA gives as an example, employees of Bell who had performed mail, reproduction, conference or audio visual planning function handled by Administrative

Services. Xerox assumed these functions in 1995 and these former Bell employees now work for Xerox performing these functions.

[4] The *retroactive period*, as defined by the Commission, is the period between February 11, 1990 (one year prior to the announcement of the Joint Study) and the *fold-in* date. The *fold-in* date would be the date of the Tribunal's *Initial Decision*. The Initial Decision would decide whether Bell's wage policies contravene s.11 of the *Act*, and if so, the wage adjustment methodology to be used to determine the extent of the wage gap and the resulting compensation to be paid by Bell, including compensation to close the wage gap, pay for all purposes, compensation on account of pain and suffering, special compensation, interest and costs.

[5] The Commission also asked in its Statement of Case, that the Tribunal make a reserve jurisdiction after the Tribunal renders its Initial Decision. It will be left to the parties to agree on the amount of the individual compensation and if the parties cannot agree on such individual compensation, the Tribunal will then deal with this question under its reserve of jurisdiction. All of the parties have agreed to this.

[6] As to the 8(c) Remedy, Bell has brought a motion asking that it be struck from the Statements of Case of the Commission and the Complainants. Bell's motion contains a composite of seventeen grounds. Broadly speaking, the grounds can be grouped into those that relate to the merits of the 8(c) Remedy; those grounds that go to the timeliness of the 8(c) Remedy and the ability of Bell to present a full and proper defense; those grounds that relate to the participation of the new employers, and those grounds that raise the issue of the Tribunal's jurisdiction to make an order against the new employers.

[7] It was not obvious, in the view of the Tribunal, as to whether Bell's motion should be dealt with now or later in the fullness of all the evidence relevant to the 8(c) Remedy, and the Tribunal asked the parties for submissions on this question.

[8] Bell's submissions were essentially this. The Tribunal's Rules of Procedure allow Bell to bring such a motion and the Tribunal must hear the merits of the motion now. Further, the motion is jurisdictional only, namely, that the Tribunal has no jurisdiction to grant the 8(c) Remedy to the extent that it involves an order against the new employers who may not be federal employers subject to the Act. Bell should not be compelled to call evidence or cross-examine on evidence dealing with issues over which the Tribunal has no jurisdiction.

[9] We do not agree that the Tribunal must deal the merits of Bell's motion now. Even if the motion raised only a jurisdictional question, and, in our opinion it is not so limited, the Tribunal still has a discretion as to whether to deal with the motion as a preliminary matter or after all of the evidence is in.

[10] In their submissions on this question, none of the parties cited any legal authorities. But as the Federal Court of Appeal noted in *Borghi v. Canada (Employment and Immigration Commission)*[(1)], this Tribunal can consider relevant authorities not cited by

counsel as long as no new ground is raised.

[11] In this regard and although not bound, we consider the decision of the Newfoundland Court of Appeal in *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)*[(2)] to be particularly instructive in dealing with the question of whether to consider the issues in Bell's motion, now or later.

[12] The *Newfoundland case* involved a referral of a complaint filed with the Newfoundland Human Rights Commission to a Board of Inquiry. At the hearing before the Board, the respondents raised a preliminary objection that the Board lacked jurisdiction to deal with the complaint because none of the Respondents were "employers" under the Human Rights Code. The Board made a preliminary determination of the objection on the understanding that it had to deal with the jurisdictional issue as a preliminary matter and dismissed the complaint. The Commission appealed this decision and it was ultimately dealt with by the Court of Appeal.

[13] One of the issues on the appeal was whether the Board had discretion as to when to deal with the objection, and if so, did it exercise it properly.

[14] The Court of Appeal decided that the Board was not compelled to hear the jurisdictional objection as a preliminary matter and had the discretion to decide whether the issue would better be heard at the conclusion of the hearing when all the relevant evidence have been tendered.

[15] The Court of Appeal concluded that the Board of Inquiry had failed to exercise its jurisdiction properly. In reaching this conclusion, the Court noted that this discretion should be exercised on either an agreed statement of facts or where the underling facts are of public record or on affidavit or oral evidence. However, the Court of Appeal cautioned that where the issues of fact and law are complex and intermingled, it is advisable to await the full hearing before ruling on the jurisdictional issue.

[16] We do not agree that the Tribunal's Rules of Procedure mandate that the Tribunal must deal with Bell's motion now. It is our opinion that whether a jurisdictional issue should be considered now or later is a matter for the Tribunal to decide in its properly exercised discretion.

[17] In the exercise of our discretion, we have decided that the issues raised by Bell's motion should be dealt with at that point in the hearing when the Tribunal deals with the 8(c) Remedy. We have reached this conclusion for two reasons. First, Bell's motion raises issues beyond just jurisdiction. Secondly, as to the jurisdictional question, there is no factual basis yet for Bell to assert that this Tribunal lacks the power to make an order against new employers. Indeed, we do not even know whether this is an issue given that the Commission and the Complainants are seeking an order only against Bell in terms of the 8(c) Remedy.

[18] As the Newfoundland Court of Appeal pointed out, "in the context of Human Rights legislation, an employment relationship is not restricted to the traditional master-servant relationship but should be more broadly defined. There being no definition in the Code, the determination in any specific case is best done in light of the purpose of the Code and in a factual context. Whether decided on a preliminary basis or after a full hearing, decisions respecting jurisdiction must be found on a clear evidentiary base. This is particularly important in cases such as this one where the Board of Inquiry must decide whether an unusual situation is intended to fall within the Code."

[19] We consider this comment to be particularly apposite for Bell's motion. Accordingly, we have decided not to deal now with the issues raised in the motion. This, of course, is without prejudice to Bell to cross-examine on any evidence offered by the Commission and the Complainants, offer its own evidence, and argue these issues after all of the evidence on the 8(c) Remedy is complete.

[20] The Commission also had something to say about the 8(c) Remedy. In its letter dated May 27, 2002 to Bell, the Commission asked that any entitlement as former employees is a discrete matter and should be dealt with separately in a separate phase of the hearing after the Tribunal has made its Initial Decision. The best argument that the Commission made was that the retroactive period would be determined at this time. If the retroactive period is very limited in time, then it may be that no former employees will be entitled to any 8(c) Remedy compensation. And it would not be necessary for the Tribunal to consider this remedy.

[21] There is a certain inconsistency in the Commission's position. On the one hand the Commission argues for a lengthy retroactive period for one purpose, yet presupposes a short retroactive period for another purpose. The Commission cannot have it both ways.

[22] Equally to the point, is that the Initial Decision (assuming a contravention of s.11 of the *Act*) would determine the compensation for all employees employed by Bell in female-dominated occupations who have received discriminatory wages. As to the 8(c) Remedy, all that would remain from an evidentiary point of view, would be to identify whether the former employees were performing the same or similar duties with the new employer, whether the new employer is controlled or related to Bell or has a commercial relationship with Bell, and whether these former employees were receiving discriminatory wages after they left Bell's employment during the retroactive period.

[23] We are not convinced that the section 8(c) Remedy involves a discrete issue and should be considered separately. In our opinion, it is in the same category as closing the wage gap, pay for all purposes, compensation for pay and suffering, special compensation, interest and costs, all of which are to be dealt with by the Tribunal as part of its Initial Decision.

[24] Accordingly, we have concluded that the Commission and the Complainants are to present all of their evidence on the 8(c) Remedy during the hearing and before the Tribunal's Initial Decision.

"Original signed by"

Grant Sinclair, Chair

Pierre Deschamps, Member

OTTAWA, Ontario

June 10, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T503/2098

STYLE OF CAUSE: CTEA et al. v. Bell Canada

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May 30, 2002

RULING OF THE TRIBUNAL DATED: June 10, 2002

APPEARANCES:

Larry Steinberg For the CTEA

Peter Engelmann For the CEP

Andrew Raven and Patrick O'Rourke For the Canadian Human Rights Commission

Gary Rosen and Guy Dufort For Bell Canada

1. [1] [1996] F.C.J. NO. 353, par. 17

2. [2] (1998) 164 NFLD & P.E.I.R. 251